U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Washington, DC 20001-8002

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Issue Date: 03 September 2003

BALCA Case Nos.: 2002-INA-292, 2002-INA-306, 2003-INA-005
ETA Case Nos.: P2000-CA-09501171/JS, P2000-CA-09501172/JS, P2000-CA-09501173/JS

In the Matters of:

CARDENAS MARKET, INC.,
Employer,

on behalf of

DANIEL GARCIA,
SILVESTRE AGUIRRE,
and
PASCUAL AVILA-CONTRERAS,
Aliens.

Appearance: Robert G. Berke
for Employer and Alien
Santa Ana, California

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER

Cardenas Market, Inc. ("Employer") has filed three applications for labor certification[1] on behalf of Daniel Garcia ("Alien"), Aguirre Silvestre ("Alien"), and Pascual Avila ("Alien"). Employer seeks to employ all three as Mexican Specialty Cooks. (AF 42).[2] Employer stated no educational qualification, but required two years of experience in the job offered. *Id.* The application reflected a forty hour work week based on a work schedule consisting of a "Rotating Shift from 12:30 a.m. to 9:00 p.m." *Id.*

This decision is based on the records upon which the Certifying Officer (CO) denied certification and Employer's request for review, as contained in the Appeal Files. 20 C.F.R. § 656.27(c). Because the same or substantially similar evidence is relevant and material to each of these appeals, we have consolidated these matters for decision. *See* 29 C.F.R. § 18.11.

STATEMENT OF THE CASE

In all cases, the Certifying Officer issued a Notice of Findings (all dated April 2, 2002) questioning whether Employer was offering a job that was truly open to U.S. workers. Specifically, the CO found that this question was raised because it appeared that Employer was either not paying wages or these wages were not being reported in California. (AF 28). Employer was directed to document that the Aliens are paid reported wages or provide persuasive argument as to how the job is truly open to U.S. workers at the prevailing wage. The CO additionally found that Employer, by requiring a rotating shift, would be adversely affecting the wages and working conditions of U.S. workers similarly employed. 20 C.F.R. §§ 656.1 and 656.2(e) The CO directed Employer to document the hours/work required by the rotating shift and document both Employer's use of this type of schedule and the use of this kind of schedule in the industry for this occupation.

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[1] Alien labor certification is governed by the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

[2] In this decision "AF" refers specifically to the Daniel Garcia Appeal File as representative of the Appeal File in all appeals. A virtually identical application was filed for all three Aliens and the issues raised and dealt with by the CO *(i.e.*, NOF, FD, etc.,) in each case are identical.

Employer submitted a timely rebuttal which included documents attesting to the fact that the Aliens were paid as part of Employer's payroll. Additionally, Employer asserts in rebuttal that the rotating shift is a business necessity that has been used by Employer for the last seven years. Relying on language from *Information Industries,* 1988-INA-82 (1989) (*en banc*), Employer asserts that Employer need only show that the requirement of a rotating shift is justified under the business necessity standard. (AF 19). Employer further argues that it is inappropriate for the CO to request documentation that the rotating shift is standard for the industry when an employer opts to submit evidence that a challenged requirement is justified on business necessity grounds. *Id.*, citing *Matter of Sidhu Associates, Inc.,* 1995-INA-182 (1997).

On July 5, 2002, the CO issued a Final Determination proposing to deny certification, finding that Employer's rebuttal failed to satisfactorily rebut the Notice of Findings. (AF 15-17). Although Employer satisfactorily documented that there is a payroll and that workers are paid wages, it failed to demonstrate that there is no adverse effect on wages or working conditions of U.S. workers similarly employed. *Id*. Employer, the CO found, has merely asserted that the company cannot keep employees without a rotating shift and has not documented that such is standard in the industry.

DISCUSSION

Employer asserts that the CO should have analyzed this case under 20 C.F.R. § 656.21(b)(2), which addresses restrictive job requirements and business necessity. Employer states that, because the CO focused on the adverse effect on working conditions of U.S. workers similarly situated, Employer should have been given the opportunity to use the business necessity standard of *Information Industries, Inc.*, 1988-INA-82 (Feb. 9, 1989) (*en banc*), when Employer raised this issue to explain the necessity of its rotating shift. *See* Appeal Brief. Employer argues that it has properly presented evidence to the CO that the rotating shift is necessary for business purposes. Furthermore, it contends that CO's requiring Employer to submit documentation attesting to similar practices in the industry is an abuse of discretion, particularly because the rotating shift was not questioned by the

local office.

Pursuant to section 656.24(b)(3), the CO is to determine whether to grant certification on the basis of whether:

> The employment of the alien will have an adverse effect upon the wages and working conditions of U.S. workers similarly employed. In making this determination the Certifying Officer shall consider such things as labor market information, the special circumstances of the industry, organization or occupation, the prevailing wage in the area of intended employment, and the prevailing working conditions, such as hours, in the occupation.

The fairness of basing a denial solely on 20 C.F.R. § 656.21(b)(3) has been questioned in several panel decisions of this Board involving split shift requirements. Indeed, those panels have insisted that such an issue be raised with great specificity and with a precise explanation of why the alleged deficiency would adversely affect wages and working conditions of workers similarly employed. *Madeline Wolf*, 1990-INA-323 (Dec. 9, 1992); *Hossein Rostam*, 1991-INA-185 (May 21, 1992); *Mrs. Beverly Adbo*, 1990-INA-578 (May 14, 1992); *Henry T.H. Hsu*, 1991-INA-156 (Apr. 13, 1992); *Ronald & Terry Allen*, 1990-INA-308 (Apr. 13, 1992); *Dr. William J. Raskoff*, 1989-INA-200 (June 21, 1991). Moreover, in cases in which the CO raised a split-shift issue under 20 C.F.R. § 656.21(b)(3), the panels held that the employer must be given the opportunity to rebut by showing the business necessity of the requirement. *Gregory G. Khaklos*, 1994-INA-50 (Nov. 16, 1994); *Madeline Wolf*, 1990-INA-323 (Dec. 9, 1992); *Hossein Rostam*, 1991-INA-185 (May 21, 1992); *Mrs. Beverly Adbo*, 1990-INA-578 (May 14, 1992); *Henry T.H. Hsu*, 1991-INA-156 (Apr. 13, 1992); *Ronald & Terry Allen*, 1990-INA-308 (Apr. 13, 1992).

In the instant case, although the precise issue is a rotating shift instead of a split shift, the principles involved are the same. We concur with Employer that the CO erred by rejecting its business necessity argument out of hand. Accordingly, we remand this case for the issuance of a new NOF that permits Employer to present evidence to establish the business necessity of its rotating shift

requirement.[3]

Accordingly, it is **ORDERED** that this matter be **REMANDED** to the Certifying Officer for further proceedings consistent with the above.

For the panel:

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JOHN M. VITTONE
Chief Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure and maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon granting of the petition the Board may order briefs.

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[3] The panel finds that the evidence in the Appeal File as it stands now is not sufficient to establish business necessity for the rotating shift requirement under *Information Industries*, 1988-INA-82 (Feb. 9, 1989) (*en banc*). However, we also conclude that it would be procedurally unfair to not permit Employer to supplement its rebuttal in this regard.